BAKER ACT

FLORIDA'S MENTAL HEALTH ACT

Florida Council on Aging

Webinar

April 12, 2022

Alternatives to the Baker Act

Mental Illness Only

- Marchman Act, Chapter 397
- Developmental Disabilities, Chapter 393
- Dementia & TBI???

Psychiatric – Not Medical

- Emergency Examination & Treatment of Incapacitated Persons, Chapter 401
- Federal EMTALA – Emergency Medical Treatment and Active Labor Act & Access to Emergency Services & Care, 395.1041 FS
- Medical Consent Law, 766.103, FS
- Rule 5.900 Expedited Judicial Intervention Concerning Medical Treatment Procedures

Intervention Alternatives

- Adult Protective Services, 415, FS
- Guardianship, 744, FS
- Advance Directives Act/Health Care Surrogate & Proxy, 765, FS

Not a Discharge Destination

- Nursing Homes / ALF's

History

- Each state has its own mental health and substance abuse laws

- 1971 passage -- 1972 implementation -- frequently amended since then

- Representative Maxine Baker / Intent:
  In the name of mental health we deny people their most precious possession -- liberty

- Addressed lack of due process when liberty is denied or treatment mandated

Balances liberty interests against safety of individual and society

- Established community based “receiving facilities”, designated by DCF to accept, examine and treat persons of all ages with acute mental illnesses on a 24/7 basis regardless of ability to pay.

Voluntary Admission - Adults

394.4625 FS and 65E-5.270 FAC

- Have a mental illness, as defined in law
- Be suitable for treatment
- Be competent to provide express and informed consent

Voluntary Admission - Minors

394.4625, FS and 65E-5.270, FAC

- Have a mental illness (same definition as for adults)
- Be suitable for treatment
- **Guardian** applies by express and informed consent for minor's admission
- Minor agrees (assents) to the admission
- **Judicial hearing** in advance of admission to confirm the voluntariness (changed to "clinical review" instead of hearing as of 7/1/22)

Mental Illness Means

394.455 (18) FS

- An impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality
- Substantially interferes with the person's ability to meet the ordinary demands of living
- **Excludes**: developmental disabilities as defined in chapter 393, intoxication, or conditions manifested **only by dementia**, **traumatic brain injury,** antisocial behavior, or substance abuse Impairment

Co-occurring Disorders?

Express and Informed Consent

- Consent voluntarily given in writing by a **competent** person after sufficient explanation
- To enable the person to make a knowing and willful decision
- Without any element of force, fraud, deceit, duress, or other form of constraint or coercion

Incompetent to Consent

- That a person's judgment is so affected by his or her mental illness or substance abuse impairment
- That the person lacks the capacity
- To make a **well-reasoned, willful and knowing decision**
- Concerning his or her medical, mental health or substance abuse treatment

Voluntary Admission Selected Procedures

394.4625 FS and 65E-5.270 FAC

- Notice of right to “request” release given at time of admission.
- Incapacitated or incompetent with a guardian – must be involuntary
- Incapacitated with health care surrogate / proxy making decisions -- must be involuntary*(see next slide)
- Certification of adult’s competence to provide informed consent to admission by physician within 24 hours of arrival
- Special protections for selected elders – should never be sent directly from nursing home to an ER for psychiatric assessment – must initiate voluntary or involuntary status first!

Psychiatric Advance Directives

394.4625(1)(e) FS

- The health care surrogate or proxy of a voluntary patient may not consent to the provision of mental health treatment for the patient. A **voluntary** patient who is unwilling or unable to provide express and informed consent to mental health treatment must either be discharged or transferred to involuntary status.

- A patient on **involuntary** status may lack capacity/competence to provide consent for his/her own treatment and a surrogate or proxy can provide substituted judgement for treatment decision-making.

- A Health Care Advance Directive can include both medical and psychiatric care or be separate. If separate, a "model" Mental Health advance directive form can be found in Appendix C (pp 6-9) of the Baker Act User Reference Guide

A Dangerous Age Series
1995 St. Petersburg Times

- 5-day, 14-page series identifying abuse of elders via the Baker Act. Statewide editorials led to rewrite of the Baker Act in 1996

- Prohibits LTC facilities from referring individuals for **voluntary admission** without first having resident examined to confirm competence to provide express and informed consent by an independent licensed MH professional (not employed by, under contract with nor having financial interest in either the sending or receiving facility).

- Applies to:
  - ✓ Person 60+ when transfer is sought from a nursing home, assisted living facility, adult day care center, or adult family-care home, when person has been diagnosed as suffering from dementia.
  - ✓ Person 60+ when transfer is sought from a nursing home under 400.0255(12).
  - ✓ Person whose decisions concerning medical treatment are currently being lawfully made by a health care surrogate / proxy.

LTC Facility Compliance

394.463(2)(b)

A person may not be removed from any program or residential placement licensed under chapter 400 or chapter 429 and transported to a receiving facility for **involuntary examination** unless a court order, a professional certificate, or a law enforcement officer's report is first prepared….

A facility admitting a person for involuntary examination who is not accompanied by the required court order, professional certificate, or law enforcement officer's report **shall notify DCF** of such admission by certified mail or by e-mail, if available, by the next working day.

Discharge of Persons on Voluntary Status

394.4625(2) FS and 65E-5.270 FAC

- Voluntary patient, relative, friend, or attorney may request discharge orally or in writing at any time following admission

- Notice of discharge request communicated within 12 hours to physician, psychologist or psychiatrist & release within 24 hours unless transferred to involuntary status

- Refusal or revocation of consent to treatment – discharge within 24 hours unless transferred to involuntary status

- Patient discharged within 24 hours of request, unless request is rescinded or patient is transferred to involuntary status

Discharge of Persons on Voluntary Status

- Petition for involuntary placement filed with Clerk of circuit court within 2 court working days after request for discharge is made. Hearing conducted by judge or magistrate within 5 court working days

- State Attorney represents the state as "real party in interest" and Public Defender represents wishes of patient. Can be court ordered for up to 90 days of treatment in a receiving facility or up to 6 months in a state treatment facility.

- Courts may not order an individual with traumatic brain injury or dementia who lacks a co-occurring mental illness to be involuntarily placed in a state treatment facility.

Transfers in Legal Status

394.4625(4)&(5) FS and 65E-5.270(1)(b) FAC

Voluntary → Involuntary

- File Petition for Involuntary Placement within 2 court working days

Involuntary → Voluntary

- All requirements of voluntary admission must be met
- Initial Mandatory Involuntary Exam by physician or clinical psychologist or psych nurse
- Certification of Competency to Consent to Treatment completed by physician
- Only then can transfer to voluntary status be made

Involuntary Examination Criteria

394.463(1) FS

Reason to believe person has a mental illness **and** because of mental illness, person has refused **or** is unable to determine if examination is necessary,

and either:

Without care or treatment, is likely to suffer from **neglect** or refuse to care for self, and such neglect or refusal poses a real and present threat of substantial harm to one's well-being and it is not apparent that such harm may be avoided through the help of willing family members, friends, or the provision of other services; **or**

There is substantial likelihood that without treatment person will cause in the near future **serious bodily harm** to self or others, as evidenced by recent behavior

Must meet all criteria

Initiating Involuntary Examinations

384.463(2) FS and 65E-5.280 FAC

Upon determination that person **appears to meet** criteria for involuntary examination, the exam may be initiated by any one of the following three means:

1. Court Order - the circuit or county court **may** enter an ex parte order based on **sworn testimony**; or

2. A law enforcement officer **shall** take into custody a person who appears to meet the criteria describing **circumstances**; or

3. A mental health professional **may** execute a certificate stating that s/he has examined the person within the preceding 48 hours and found the person met the criteria and stating the **observations** by that professional upon which that conclusion is based

Certificate of a Mental Health Professional

394.455(5), (7), (26), (27), (33).,(34), (36) & (37) FS

Mental Health Professional defined…

- **Physician:** Medical practitioner licensed under chapter 458 or chapter 459 who has experience in the diagnosis and treatment of mental illness or a physician employed by a facility operated by the United States Department of Veterans Affairs or the United States Department of Defense
- **Psychiatrist:** Medical practitioner licensed under chapter 458 or 459 for a period of not less than 3 years, inclusive of psychiatric residency
- **Physician Assistant** licensed under chapter 458 or chapter 459 experienced in diagnosis/treatment of mental disorders
- **Advanced Practice Registered Nurse** registered under s. 464.0123

- **Psychiatric Nurse:** an advanced practice registered nurse licensed under s. 464.012 who has a master's or doctoral degree in psychiatric nursing, holds a national advanced practice certification as a psychiatric mental health advanced practice nurse, and has 2 years of post-master's clinical experience under the supervision of a physician

- **Clinical Psychologist:** as defined in s. 490.003(7) with **3 years** of postdoctoral experience in the practice of clinical psychology, inclusive of the experience required for licensure, or a psychologist employed by a facility operated by the United States Department of Veterans Affairs that qualifies as a receiving or treatment facility under the Baker Act

- **Clinical Social Worker:** a person licensed as a clinical social worker under s. 491.005 or s. 491.006 (*examination or endorsement)*

- **Licensed Mental Health Counselor**: Means a mental health counselor licensed under s. 491.005 or s.491.006

- **Licensed Marriage and Family Therapist**: Means a marriage and family therapist licensed under s.491.005 or s.491.006

Certificate of a MH Professional

384.463(2)(a)3 FS and 65E-5.280(3) FAC

- Examination within 48 hours prior
- By an authorized professional
- Citing observations of the professional on which his / her conclusion is based
- Observations must relate to the criteria
- Transportation to nearest receiving facility or in accord with approved Transportation Plan – transfer later if appropriate
- Certificate of a MH Professional (3052b)

Baker Act
Involuntary Examinations

	Statewide*
1999	75,945
2000	80,888
2001	91,468
2002	100,158
2003	104,600
2004	110,697
2005	122,206
2006	120,506
2007	122,454
2008	132,066
2009	136,120
2010	143,347
2011	150,466
2012	157,352
2013	171,744
2014	181,471
2015-16	194,354
2016-17	199,944
2017-18	205,781
2018-19	210,992
Rate per 1,000	10.1
BA Rate–Minors	12.4
BA Rate–65+	3.7
Suicide Rate	.153
Court	2.2%
MHP	46.5%
LEO	51.3%

* County Specific data available

Involuntary Examination

394.463(2)(f) & 65E-5.2801(1) FAC

- Examination must be conducted **without unnecessary delay** by a physician or psychologist or in some cases by a psychiatric nurse at a receiving facility or hospital.

- Disposition within 72 hours of arrival at first hospital or receiving facility

- "Approval" for release from receiving facility can only be done by a psychiatrist or a clinical psychologist or an ER physician. Also under some circumstances by a "psychiatric nurse" as defined in the Baker Act unless the examination was initiated by a psychiatrist.

- If each criteria for involuntary placement is met, including that no less restrictive & more appropriate alternative is available, a petition for involuntary placement will be filed with the court.

Notices

394.4599 FS

Voluntary Admission: No notice for adults except in emergencies

Involuntary Admission:

- Prompt notice (within 24 hours) of arrival by phone or in person to guardian, guardian advocate, surrogate/proxy, designated representative
- May not waive notice of admission or other required notices even if patient requests no notification

Other Required Notices:

- Prompt notice to patient, representative, guardian advocate, guardian, surrogate /proxy, attorney provided by mail or hand delivery
- Notices apply to all restriction of rights, petitions filed, transfers, release, etc

Elders with Psychiatric & Behavioral Needs in LTC Facilities

Mental illness occurs at all ages and circumstances and is treatable

Consequences of transfer for psychiatric purposes

- Ambulation and continence
- Confusion and disorientation
- Transfer or Relocation Trauma
- When can service be on site?

Federal OBRA law requires specialized needs of nursing home residents be met:

- Assessment
- Consultation
- Intervention
- Treatment

FHCA Best Practice Tool

See FHCA best practice tool on Behavior Management / Aggression Control & Baker Act Guidelines (Appendix E)

- 1:1 oversight as possible
- Enlist staff familiar with resident & who have successfully redirected behaviors in past
- Gather behavioral data & document hourly
- Verbally redirect & assist resident to quiet area
- Review/revise current plan of care to calm: Toileting, food & fluids, warmth, repositioning, rest, music, reminiscence therapy, aroma therapy, safe outdoor activity, past successful diversions – document effectiveness of interventions.

(continued)

FHCA Best Practice Tool

(continued)

- Interact in calm, non-threatening way. Be kind and direct, not forcing care. Back away if resident accelerates
- Assure resident has adaptive devices
- Assess for acute onset of infection and for signs of acute pain. Medicate for pain when appropriate
- Review medication profile, checking for recent changes
- Provide sedative if required and as ordered by doctor
- Doctor may order lab work to rule out physiological causes (UTI, etc)
- Keep doctor notified of status
- Keep resident within known home environment as long as medically safe to do so

(continued)

FHCA Best Practice Tool

(continued)

- Baker Act only for psychiatric exam – never when behavioral conditions are not psychiatric in nature. If Baker Act must be used, initiate on voluntary or involuntary – never for "altered mental status".
- If Baker Act is necessary, notify primary physician to conduct examination and prepare initiation form (may delegate through psychologist, LCSW, LMHC, LMFT, or psychiatric nurse – law enforcement called to initiate only in imminent danger.
- Notice of transfer per federal/state laws.
- Baker Act receiving facility legally obligated to report sending LTC facility for non-compliance.

Current Issues
Baker Act/Nursing Homes

- Emergencies or just unaddressed problems?
- Admission of persons with behavioral issues to nursing homes without clinical consideration?
- In-place assessment of residents with aggressive or self-neglectful behavior
- Rule out non-psychiatric causes of behavioral problems, especially pain, infection, and medication interactions
- Provide therapeutic interventions by qualified staff to avoid Baker Act
- Appropriate initiation of involuntary examination (unlikely that voluntary admission will be appropriate)

Current Issues - continued

- Involuntary exam by physician, psychologist, clinical social worker, LMHC, LMHT, or psychiatric nurse documenting observations that criteria is met – prior to transfer (not required to be independent professional)
- Reevaluate for readmission after psychiatric exam & treatment -- not before
- Readmission to nursing home -- residents sent to another NH licensed and staffed the same as first NH that couldn't manage resident's behavior??
- Refused readmission for "dangerousness" ?? Federal case law!
- Residents discharged or transferred for one reason but refused for readmission for another?

Conflict Between Baker Act and Guardianship Law

A specific law covering a particular subject always prevails over a general law. When words of a law convey a definite meaning, courts must read the law as written

744.3215(4)(a) Rights of persons determined incapacitated

(4) Without first obtaining specific authority from the court, as described in s. 744.3725, a **guardian may not:**

(a) Commit the ward to a facility, institution, or licensed service provider without formal placement proceeding, pursuant to chapter 393, **chapter 394**, or chapter 397

744.3725 Procedure for extraordinary authority

Before the court **may** grant authority to a guardian to exercise any of the rights specified in s. 744.3215(4), the court must….(1)-(5)

Conflict Between Baker Act and Guardianship Law (continued)

394.4625 Baker Act Voluntary Admission

(d) A facility **may not** admit as a voluntary patient a person who has been adjudicated incapacitated, unless the condition of incapacity has been judicially removed. Facility must either discharge the patient or transfer the patient to involuntary status.

(e) The health care surrogate or proxy of a voluntary patient may not consent to the provision of mental health treatment

394.469 Release from Involuntary Status

Transfer person to voluntary status if willing and competent to provide express and informed consent, unless under criminal charges **or adjudicated incapacitated;**

Case Law on Baker Act for Guardianships

Hugh T. Handley Public Guardian, Second Judicial Circuit of Florida, Guardian, et al. v. Britton B. Dennis, Administrator of Florida State Hospital and Nancy Daniels, Public Defender, Second Judicial Circuit of Florida, 642 So. 2d 115 (Fla. 1st DCA 1994). The 1st DCA stated that when there is a conflict with the area of guardianship law, Chapter 744, and the Baker Act, Chapter 394, both the duty of the guardian and the power of the guardianship court, give way to the ward's rights under the Baker Act to be in the least restrictive environment...

Auxier V. Jerome Golden Center for Behavioral Health and Alpert Jewish Family & Children Services, the plenary guardian of the ward, Julie Auxier, 4d12-1019, The 4DCA found the magistrate and the circuit court departed from the essential requirements of the Baker Act that requires appointment of the PD's office "unless the person is otherwise represented by counsel." The guardian's attorney represents the guardian, not the ward. The 4th DCA concurs with the 1st DCA ruling in Handley v. Dennis.

Rights of Persons

394.459 FS and 65E-5.140 FAC

Rights include:

- Individual dignity
- Treatment
- Express and Informed Consent
- Quality of Treatment
- Complaints & Grievances
- Communication & Abuse Reporting
- Care And Custody of Personal Affects
- Voting in Public Elections
- Habeas Corpus
- Confidentiality

Above apply in crisis stabilization units and in any general or specialty hospital holding a person under the Baker Act

Posting of rights & phone numbers:

- Abuse Registry / Hotline
- Disability Rights Florida, Inc.
- Americans with Disabilities Act -- ADA

Duties of All Hospitals in Florida Condition of Licensure

395.003(5)(a) Adherence to patient rights, standards of care, and examination and placement procedures provided under Baker Act **shall be a condition of licensure for hospitals** providing voluntary or involuntary medical or psychiatric observation, evaluation, diagnosis, or treatment

395.1041(6)(a) Rights of persons being treated -- A hospital providing **emergency services** and care to a person who is being involuntarily examined under the provisions of s. 394.463 **shall adhere** to the rights of patients specified in the Baker Act and the involuntary examination procedures, regardless of **whether the hospital, or any part thereof, is designated as a receiving or treatment facility** and regardless of whether the person is admitted to the hospital

Duties of All Hospitals (continued)

395.003(5)(b) Any hospital that provides psychiatric treatment to **persons under 18** years of age who have emotional disturbances shall comply with the procedures pertaining to the rights of patients prescribed in part I of chapter 394

395.3025 Patient and personnel records

(2) This section does not apply to records maintained at any licensed facility the primary function of which is to provide **psychiatric care** to its patients, or to records of treatment for any mental or emotional condition at any other licensed facility which are governed by the provisions of the Baker Act

(3) This section does not apply to records of **substance abuse** impaired persons, which are governed by the Marchman Act

Duties of All Hospitals

(continued)

395.1055(6) AHCA shall enforce the Baker Act law and rules, with respect to the rights, standards of care, and examination-placement procedures voluntarily or involuntarily admitted to hospitals providing psychiatric observation, evaluation, diagnosis, or treatment

Criminal & Administrative Penalties

(395.1065(4) FS)

In seeking to impose penalties against a facility for a violation of the Baker Act, AHCA is authorized to rely on the investigation and findings by the Department of Health in lieu of conducting its own investigation

On-Line Training Opportunities

http://www.dcf.state.fl.us/programs/samh/mentalhealth/training/bacourses.shtml

Introduction to Baker Act + Refresher

Implementing Baker Act - Receiving Facilities

Law Enforcement & Baker Act + Refresher

Emergency Medical - Baker/Marchman Acts

Baker Act & Long-Term Care Facilities

Minors and the Baker Act

Marchman Act Basics + Refresher

Guardian Advocates (Baker & Marchman)

Suicide Prevention

No fee

Certificate of Achievement

DCF Baker Act Website

https://www.myflfamilies.com/service-programs/samh/crisis-services/ /

Click on **Baker Act**. Contents include:

- 2014 Baker Act Handbook
- Copy of Baker Act law (394, Part I, FS) and rules (65E-5, FAC)
- Baker Act forms – mandatory and recommended
- Selected forms in Spanish & Creole
- Baker Act monitoring/survey instruments
- Frequently Asked Questions (FAQ's) on 21 subject area
- List of all public and private receiving facilities throughout the state
- Mental Health Advance Directives
- Other relevant materials

DCF Marchman Act Website

https://www.myflfamilies.com/service-programs/samh/crisis-services/marchman-act.shtml

Click on **Marchman Act**. Contents include:

2003 Marchman Act User Reference Guide includes among other issues:

- Statute & Rules
- History & Overview
- Marchman Act Model Forms
- Law Enforcement and Protective Custody
- Quick Reference Guide for Involuntary Provisions
- Flow Charts for Involuntary Provisions
- Admission & Treatment of Minors
- Where to Go for Help
- Marchman Act Pamphlet
- Substance Abuse Program Standards
- Common Licensing Standards
- Marchman Act PowerPoint Presentation

FCOA Issues?

- What is the Baker Act?
- What does the law say about use of the Baker Act on older adults and/or people with dementia?
- Why the increase of involuntary examinations?
- How is the Baker Act being used in long term care settings?
- What advocacy is needed to support people with dementia from being improperly committed?
- What updates has the Legislature made to help protect people with dementia or brain injury from misuse of the Baker Act?
- How can Psychiatric Advance Directives be used before a mental health crisis occurs?
- Participant questions?